UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THOMAS C. SEYMOUR,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-197-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from chronic headaches, borderline intellectual functioning, an affective disorder, rule-out personality disorder and substance-abuse disorder, is capable of making a successful vocational adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

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[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on October 27, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Pursuant to the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffers from chronic headaches, borderline intellectual functioning, affective disorder, rule-out personality disorder and substance-abuse disorder, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 25; that he lacked the residual functional capacity ("RFC") to work in exposure to loud noises or extremes of heat or cold, to do more than simple, routine tasks or to do work involving more than occasional interaction with supervisors, co-workers or the general public, Finding 5, *id.*; that he was unable to perform his past relevant work as a dishwasher, cashier and laborer, Finding 6, *id.*; that considering his age ("younger individual"), education ("limited"), work experience ("unskilled") and RFC, he was able to make a successful vocational adjustment to work existing in significant numbers in the national economy, including work as a janitor and assembly worker, Findings 8-11, *id.*; and that he therefore had not been under a disability at any time through his date last insured (June 30, 2000) or the date of decision (March 13, 2002), Findings 1, 12, *id.* at 25-26. The Appeals Council declined to review the decision, *id.* at 6-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff contends as a threshold matter that the administrative law judge erred in rejecting, without sufficient justification, the hearing testimony of medical expert Edward A. Hoffman, Ph.D., that his condition met Listings 12.04 (affective disorders), 12.06 (anxiety-related disorders) and 12.08 (personality disorders). *See* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 4) at 2. Alternatively, he argues that (i) the administrative law judge's RFC finding is erroneous, (ii) even accepting *arguendo* the correctness of that RFC finding, the vocational testimony does not support a Step 5 denial and (iii) the Appeals Council erred in failing to grant review based on newly submitted evidence (a neuropsychological evaluation conducted by James D. Thomas, Ph.D.). *See id*. at 3-11. He seeks remand for payment of benefits or, alternatively, remand for further proceedings. *See id*. at 11.

The plaintiff's Listings argument is without merit. However, I agree that the administrative law judge's RFC finding is unsupported by substantial evidence of record. That error cannot confidently be characterized as harmless inasmuch as it calls into question the accuracy of hypothetical questions posed to the vocational expert who testified at hearing. The vocational expert's testimony, in turn, provided the basis for the Step 5 finding that the plaintiff retained the capacity to work. Remand for further proceedings accordingly is warranted.

I. Discussion

A. Rejection of Medical Expert's Opinion Concerning Listings

As a threshold matter, the plaintiff complains that the administrative law judge rejected Dr. Hoffman's Listings testimony without sufficient justification, a proposition for which he cites *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999) ("The ALJ's findings of fact are conclusive when supported by substantial evidence, but are not conclusive when derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts.") (citations omitted). *See id*. at 2.

As the plaintiff suggests, *see id*. at 2, the administrative law judge seemingly relied on his own assessment of the raw medical evidence to rebut the Hoffman opinion, *see* Record at 22-23. Arguably this was error. *See, e.g., Manso-Pizarro*, 76 F.3d at 17 ("With a few exceptions (not relevant here), an ALJ, as a lay person, is not qualified to interpret raw data in a medical record."). Nonetheless, any such error was harmless inasmuch as:

1. As counsel for the plaintiff conceded at oral argument, the administrative law judge was not obliged to accept Dr. Hoffman's testimony that the plaintiff's condition met one or more Listings. *See, e.g*., 20 C.F.R. §§ 404.1527(e)(2), 404.1527(f)(2)(iii), 416.927(e)(2) & 416.927(f)(2)(iii) (medical expert's opinion on whether claimant meets Listings non-binding on commissioner).

2. The Record contains a Psychiatric Review Technique form ("PRTF") completed by non-examining Disability Determination Services ("DDS") consultant Thomas A. Knox, Ph.D., noting that the plaintiff's condition did not meet or equal a Listing. *See* Record at 255. The fact that this PRTF was neither discussed or cited by the administrative law judge does not negate its existence.

3. No reason appears why the January 8, 2001 Knox PRTF, which factors in all relevant evidence then available (including progress notes of treating physician Thomas Bull, M.D., reflecting

improvement in the plaintiff's mental health following treatment from April through June 2000, *see id*. at 184-91, and a report dated January 3, 2001 by DDS examining consultant Jonathan H. Siegel, Ph.D., noting, *inter alia*, that the plaintiff scored a 60 on a global assessment of functioning, reflecting a moderate level of symptomatology, *see id*. at 230-37) cannot serve as substantial evidence in support of the administrative law judge's Listings finding. *See id*. at 267 (Knox PRTF); *see also Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) ("[T]he amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert. In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.") (citations and internal quotation marks omitted).

The administrative law judge accordingly committed no reversible error in rejecting the Hoffman opinion. *See Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts."); *see also, e.g., Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252 (8th Cir. 1998) ("We have often held that [a]n arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where . . . the deficiency probably ha[s] no practical effect on the outcome of the case.") (citations and internal quotation marks omitted).

B. Mental RFC Finding

The plaintiff fares better with his alternative argument that the administrative law judge's RFC finding is erroneous. *See* Statement of Errors at 3-6. As was the case in his analysis of whether the plaintiff met the Listings, the administrative law judge seemingly relied on his own assessment of the raw medical record

to derive the plaintiff's RFC. *See* Record at 23. Such an approach constitutes error. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record").

However, in this case any such error cannot be categorized as harmless. The administrative law judge's mental RFC findings collide in certain significant respects with those of Dr. Knox – a conflict the administrative law judge fails even to acknowledge, let alone explain. For example, Dr. Knox found the plaintiff to have moderate difficulties in maintaining concentration, persistence and pace, while the administrative law judge found only a mild limitation in those areas. *Compare* Record at 265 *with id*. at 22. Likewise, Dr. Knox found the plaintiff to be markedly limited in ability to interact with the general public and to be capable of performing "simple tasks that do not require dealing [with] the public or [with] large groups," while the administrative law judge found him to be capable of doing work involving no more than occasional interaction with the general public. *Compare id*. at 270-71 *with id*. at 23.

The Knox mental RFC assessment stands as the only mental RFC assessment of record.[2] The administrative law judge could not simply choose to ignore it, or pick and choose from it *sub silentio*, to craft an RFC. *See, e.g.*, Social Security Ruling 96-6p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-6p"), at 130 ("Because State agency medical and

[2] In a PRTF dated August 6, 2000, DDS non-examining consultant S. Hoch, Ph.D., rated the plaintiff's mental impairments non-severe. *See* Record at 246-54. He accordingly did not complete a mental RFC form. The administrative law judge supportably implicitly chose not to credit the Hoch PRTF's finding of non-severity. The Hoch report predated both the Siegel report and reports of diagnostic testing performed in November and December 2000 by Dr. Charles S. Grunder, LCPC. *See* Record at 226-29. Counsel for the commissioner conceded at oral argument that the Hoch PRTF cannot constitute substantial evidence in this case.

psychological consultants and other program physicians and psychologists are experts in the Social Security disability programs, the rules in 20 CFR 404.1527(f) and 416.927(f) require administrative law judges and the Appeals Council to consider their findings of fact about the nature and severity of an individual's impairment(s) as opinions of nonexamining physicians and psychologists. Administrative law judges and the Appeals Council are not bound by findings made by State agency or other program physicians and psychologists, but they may not ignore these opinions and must explain the weight given to the opinions in their decisions.").[3]

One cannot be confident in this case that the error was harmless inasmuch as the substantiality of evidence supporting the commissioner's Step 5 finding hinged on the accuracy of the data transmitted via hypothetical questions to the vocational expert. *See, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (responses of vocational expert are relevant only to extent offered in response to hypotheticals that correspond to medical evidence of record). The error accordingly requires remand for reconsideration of the plaintiff's mental RFC and, to the extent that RFC is found to require amendment, positing of new hypotheticals to a vocational expert.

C. Remaining Points of Error

For purposes of remand I briefly address the plaintiff's two remaining points of error.

1. Conflict between vocational testimony and DOT. The plaintiff correctly notes that the vocational expert's testimony at hearing that a person with no skills can perform janitor and assembler jobs is in some respects at odds with descriptions given in the Dictionary of Occupational Titles (U.S. Dep't of

[3] Although the administrative law judge mentions the plaintiff's marijuana habit, *see* Record at 22, counsel for the commissioner acknowledged at oral argument that there is no evidence of Record that this habit is material to the plaintiff's claimed disability. *See* 20 C.F.R. §§ 404.1535(b)(1), 416.935(b)(1) ("The key factor we will examine in determining
(continued on next page)

Labor, 4th ed. rev. 1991) ("DOT"). *See* Statement of Errors at 6-8; Social Security Ruling 00-4p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 00-4p"), at 245 ("Using the skill level definitions in 20 CFR 404.1568 and 416.968, unskilled work corresponds to an SVP [Specific Vocational Preparation] of 1-2; semi-skilled work corresponds to an SVP of 3-4; and skilled work corresponds to an SVP of 5-9 in the DOT."); *compare* Record at 53-54 (vocational expert testimony) *with* Attachments to Statement of Errors (DOT printouts showing janitor job to have SVP of 3; some assembler jobs to have SVPs of 3 or higher).

The administrative law judge failed to identify and resolve this conflict as required by SSR 00-4p. *See* SSR 00-4p, at 243 ("[B]efore relying on VE or VS evidence to support a disability determination or decision, our adjudicators must . . . [i]dentify and obtain a reasonable explanation for any conflicts between occupational evidence provided by VEs or VSs and information in the [DOT]" and "explain in the determination or decision how any conflict that has been identified was resolved."). In this case, in the absence of any further explanation, it appears that the plaintiff would be unable to perform one of the two classes of jobs the vocational expert identified (janitor) and unable to perform a number of individual jobs within the second broad class (assembler). It is unclear from the Record whether a sufficient number of assembler jobs remain to carry the commissioner's Step 5 burden of proving that the plaintiff remains capable of performing work existing in substantial numbers in the national economy. To the extent the commissioner intends upon remand to continue to rely upon the plaintiff's ability to perform janitor and assembler jobs, this error must be addressed.

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whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.").

2. Asserted Appeals Council Error in Ignoring New Evidence. The plaintiff's contention that the Appeals Council erred in declining to consider Dr. Thomas's neuropsychological evaluation is without merit. "[A]n Appeals Council refusal to review the ALJ may be reviewable where it gives an egregiously mistaken ground for this action." *Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001). The Appeals Council found that the Thomas evaluation provided no basis for changing the administrative law judge's decision. *See* Record at 6. This finding cannot fairly be characterized as "egregiously mistaken." The Thomas report is largely consistent with preexisting evidence of record in finding the plaintiff to be suffering from low-average intellectual ability and to have given questionable responses in personality testing. *Compare* Record at 234-35 (Siegel report), 228 (Grunder report) *with id*. at 297-99 (Thomas report). Nonetheless, counsel for the commissioner conceded at oral argument that it would be appropriate to factor in the Thomas report were remand warranted on other grounds.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of October, 2003.

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David M. Cohen
United States Magistrate Judge

Plaintiff

THOMAS C SEYMOUR represented by **DANIEL W. EMERY**
36 YARMOUTH CROSSING DR
P.O. BOX 670
YARMOUTH, ME 04096
(207) 846-0989
Email: danemery@maine.rr.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

SOCIAL SECURITY ADMINISTRATION COMMISSIONER represented by **HUNG TRAN**
OFFICE OF GENERAL COUNSEL
SOCIAL SECURITY ADMINISTRATION
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203
(617)565-4277
Email: hung.t.tran@ssa.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

JAMES M. MOORE
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
Email: jim.moore@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PETER S. KRYNSKI
SOCIAL SECURITY DISABILITY
OFFICE OF THE GENERAL
COUNSEL
5107 LEESBURG PIKE ROOM 1704
FALLS CHURCH, VA 22041-3255
(703) 305-0183
TERMINATED: 10/27/2003
LEAD ATTORNEY
ATTORNEY TO BE NOTICED